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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

R.A.V.,
Petitioner,
v.
ST. PAUL, MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the First Amendment bars the prosecution of an individual for burning a cross on the lawn of a black family's home in the middle of the night under a city ordinance that has been authoritatively construed by the State's highest court to prohibit only expressive conduct that inflicts injury or tends to incite immediate violence, or is directed to inciting imminent lawless action.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. These organizations

and their members have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments.

State and local governments have primary responsibility for enacting laws prohibiting conduct that inflicts injury or incites violence. This case concerns the constitutionality of a city ordinance that proscribes certain expressive conduct that constitutes "fighting words." Numerous States and local governments have enacted comparable legislation. *See Anti-Defamation League Law Report* (Spring/Summer 1988 & 1990 supp.). *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

1. The Minnesota Supreme Court's interpretation of the St. Paul ordinance is authoritative and conclusive. Construction of a state statute does not present a federal question, and this Court has repeatedly declined to review a state court construction of state or local legislation. What is at issue in this case, therefore, is the validity of the St. Paul ordinance as it has been construed by the Minnesota Supreme Court.

2. The Minnesota Supreme Court's narrowing construction of the St. Paul ordinance to apply only to "fighting words" and words " 'directed to inciting or producing imminent lawless action' " is constitutional. This Court has long recognized "fighting words" as an unprotected category of speech and has defined "insulting or 'fighting' words" as "those which by their very utterance inflict injury or tend

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Such expressive conduct is unprotected because it is targeted at a particular victim and does not in any sense communicate information or opinion safeguarded by the Constitution.

The "fighting words" construction by the Minnesota Supreme Court is, moreover, neither overbroad nor vague. This Court has repeatedly said that state courts can repair overbroad statutes by judicially limiting them to "fighting words." The Minnesota Supreme Court has limited the St. Paul ordinance by expressly adopting the definition of "fighting words" set forth in *Chaplinsky*.

Limiting the ordinance to particular types of "fighting words" does not make it unconstitutionally narrow. "Fighting words" is an unprotected category of speech. There can be no First Amendment violation in addressing problems caused by a subcategory of speech that has no First Amendment protection. Even if there could be a constitutional infirmity in addressing some "fighting words" differently than others, the St. Paul ordinance has, in a viewpoint neutral way, properly singled out "fighting words" with particularly severe and widespread social consequences. Moreover, the ordinance as interpreted requires elements of context and targeting to show that covered speech constitutes unprotected fighting words.

3. Petitioner's burning of a cross on a black family's lawn in the middle of the night is a clear instance of fighting words properly proscribed by the St. Paul ordinance. It is the type of conduct that could provoke a reasonable person to respond violently. It is also a personal assault upon a particular family, and as such it has no First Amendment protection.

ARGUMENT

I. THE MINNESOTA SUPREME COURT'S INTERPRETATION OF THE ST. PAUL ORDINANCE IS BINDING ON THIS COURT.

The Minnesota Supreme Court limited the scope of the St. Paul ordinance to "fighting words" and words directed to inciting imminent lawless action—two well-recognized categories of speech unprotected by the First Amendment. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Minnesota Supreme Court thereby properly narrowed the ordinance to "avoid doubtful constitutional questions." *Fox v. Washington*, 236 U.S. 273, 277 (1915) (Holmes, J.).

Petitioner contends that the Minnesota court's narrowing construction should not be respected here. *See* Pet. Br. 22-26.[2] The law, however, has been settled for at least a century that "[t]he meaning of a state statute, declared by the highest court of a State, is conclusive upon this court." *Morley v. Lake Shore and Mich. S. Rwy. Co.*, 146 U.S. 162, 167 (1892). Basic principles of federalism, and this Court's limited statutory jurisdiction over state court decisions (now codified at 28 U.S.C. § 1257 (1988)), preclude this Court from reexamining the meaning of a state or local law. The meaning of a state statute or local ordinance is not a federal question:

> If, then, the law as enacted by the legislature, and construed by the state judiciary, will be the

[2] *Amici* supporting Petitioner, however, acknowledge that the Minnesota Supreme Court's "interpretation of state law is authoritive and must be accepted by this Court." Br. Am. Cur. ACLU *et al.* 11-12 (citations omitted). *See also* Br. Am. Cur. Ass'n of Am. Publ. 14.

> law of the State, it follows that, as to the proper construction of the statute and as to what should be regarded as among its terms, no Federal question could arise. The most that could be claimed would be that, although the statute of the State was unobjectionable, yet the state court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law; which latter question alone is, by the plainest possible terms of the Constitution and judiciary act, subject to investigation here. Assuming, then, that the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself, as construed by the state court.

Morley, 146 U.S. at 167. *See also Gooding v. Wilson*, 405 U.S. 518, 520 (1972) (Court " 'lack[s] jurisdiction authoritatively to construe state legislation' ") (quoting *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971)).

The Court long ago rejected the argument that it could disregard a state court interpretation of a statute that allegedly "caused the statute 'to enact what confessedly the legislature never meant.' " *Olsen v. Smith*, 195 U.S. 332, 342 (1904) (quoting *Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)). Although Petitioner apparently attempts to resurrect that discredited argument here, the cases he cites underscore the conclusive respect that this Court gives to state court constructions of state law. In *Virginia v. American Bookseller's Ass'n*, 484 U.S. 383 (1988), cited in Pet. Br. 22, the Court held that *it* would not "rewrite a [Virginia] state law to conform it to constitutional requirements," 484 U.S. at 397, but instead certified the questions of statutory interpre-

tation to the Virginia Supreme Court. *See id.* at 398. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court did not "refuse to apply a narrowing construction even when one appeared available," as Petitioner contends (Pet. Br. at 23), but rather observed that it saw no possible limiting construction and that the state courts had supplied none. 422 U.S. at 216.

The issue in this case, then, is not whether the Minnesota Supreme Court could narrow the scope of the St. Paul ordinance as it did. The issue is whether the ordinance, as authoritatively limited to two specific categories of unprotected speech, violates the First Amendment.

II. THE ST. PAUL ORDINANCE, AS LIMITED TO "FIGHTING WORDS" AND INCITEMENT TO IMMINENT LAWLESS ACTION, IS CONSTITUTIONAL.

The Minnesota Supreme Court based its narrowing construction of the St. Paul ordinance on two separate doctrines. One is the "fighting words" doctrine first articulated in *Chaplinsky*. As the Minnesota court observed, the Constitution does not protect "expressive conduct that amounts to 'fighting words'—conduct that itself inflicts injury or tends to incite immediate violence." Pet. App. A-4 (*In re R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991)) (citing *Chaplinsky*, 315 U.S. at 572). The Minnesota court further held that the ordinance "is also . . . constitutional to the extent it prohibits conduct that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" Pet. App. A-4 (464 N.W.2d at 510) (quoting *Brandenburg*, 395 U.S. at 447).

This is a "fighting words" case. The St. Paul ordinance has been applied to expressive conduct the clear intent of which was to inflict injury on a particular victim or to incite a violent response.[3] *Amici* submit that the Minnesota court's express limitation of the ordinance to this category of conduct—clearly unprotected under this Court's precedents—is dispositive of the constitutionality of the ordinance. However, because the scope of the "fighting words" doctrine is at the heart of this case, it will be examined here in more detail.

A. The Definition of "Fighting Words."

Ever since *Chaplinsky v. New Hampshire*, the Court has identified "fighting words" as a category of unprotected speech; other categories include libel, incitement to riot, obscenity, and child pornography. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984). Not all categories of unprotected expression have been easy to define. *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (obscenity). "Fighting words," however, were described from the outset in a classic formulation repeatedly invoked in subsequent cases:

> insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

[3] Petitioner's act of burning a cross on the lawn of a black family in the dead of night, whatever else may be said about it, apparently was not done under circumstances where third parties could have been incited to riot. Thus the "incitement to imminent lawless action" proscription of the ordinance is not at issue here—although prohibiting expression of this type plainly raises no constitutional concerns. *See Brandenburg*, 395 U.S. at 447.

Chaplinsky, 315 U.S. at 572. *See also City of Houston v. Hill*, 482 U.S. 451, 461-62 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (citing *Gooding v. Wilson*, 405 U.S. 518, 522 (1972)). This is the very definition used by the Minnesota Supreme Court. *See* Pet. App. A-4 (464 N.W.2d at 510) (citing *Chaplinsky*, 315 U.S. at 572).

This Court has reaffirmed its adherence to the *Chaplinsky* definition of "fighting words" in a recent line of cases, beginning with *Gooding v. Wilson*, 405 U.S. 518 (1972). In *Lewis*, an ordinance prohibited the use of "opprobrious" language "toward or with reference to" a police officer in the performance of his duties. 415 U.S. at 132. The Court measured the overbreadth of the ordinance by its failure to comply with *Chaplinsky*: it "plainly has a broader sweep than the constitutional definition of 'fighting words' announced in [*Chaplinsky*] and reaffirmed in [*Gooding*], namely, 'those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Id.* (quoting *Chaplinsky*, 315 U.S. at 572). In *City of Houston v. Hill*, 482 U.S. 451 (1987), the Court invalidated a Houston ordinance similar to the ordinance in *Lewis*, phrased in terms of "interrupt[ing] any policeman in the execution of his duty." 482 U.S. at 455. Explaining *Lewis* the Court said,

> Critical to our decision was the fact that the ordinance . . . was not limited in scope to fighting words that " 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.' "

Id. at 461-62 (quoting *Lewis*, 415 U.S. at 133, quoting *Gooding*, 405 U.S. at 525). *See also Texas v. Johnson*, 491 U.S. 397, 409 (1989) (expressive conduct protected where it could not reasonably be regarded as "a direct personal insult or an invitation to exchange fisticuffs") (collecting cases). While each of these cases reaffirmed the *Chaplinsky* definition of fighting words, none of them elaborated on what this formulation means. For that, one must turn back to *Chaplinsky* itself.

The defendant in *Chaplinsky* was prosecuted for calling the complainant a "damned racketeer" and a "damned Fascist." The New Hampshire court considered these to be words that would have been "likely to cause an average addressee to fight." *See* 315 U.S. at 573 (quoting *State v. Chaplinsky*, 91 N.H. 310, 320, 18 A.2d 754, 762 (1941)). This Court did not disagree, but went on to address the underlying issue of why "insulting or 'fighting' words" should fall outside the scope of the First Amendment:

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

315 U.S. at 572 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940)). This classic analysis has since served as a touchstone for isolating categories of unprotected speech. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 746 (1978); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Lewis*, 415 U.S. at 140-41 (Blackmun, J., dissenting);

Papish v. Board of Curators, 410 U.S. 667, 676 (1973) (Rehnquist, J., dissenting); *Rosenfeld v. New Jersey*, 408 U.S. 901, 903-04 (1972) (Powell, J., dissenting).

The category of unprotected expression defined by the *Chaplinsky* formulation is not limited to speech or expressive conduct likely to provoke a violent reaction. It encompasses expression that amounts to no more than the hurling of a verbal rock: a targeted assault having only a marginal relationship to any exposition of ideas. As the Court indicated in *Chaplinsky*, the character of this speech is "not to be defined in terms of a what a particular addressee thinks . . . The test is what men of common intelligence would understand." 315 U.S. at 573 (quoting 91 N.H. at 320, 18 A.2d at 762). The *Chaplinsky* formulation thus does not turn on the individual victim's reaction to verbal abuse; rather, the focus is on how the expression would be perceived by a reasonable person. *See* 315 U.S. at 573. *See also Texas v. Johnson*, 491 U.S. at 409 (expressive conduct not unprotected fighting words where "[n]o reasonable onlooker" would have so regarded it).

Of course, *Chaplinsky* does not place all insulting speech outside First Amendment boundaries. Essential to "insulting or 'fighting' words" under *Chaplinsky* and subsequent cases is their targeted nature: they must be directed to a particular victim. Thus, in *Hess v. Indiana*, 414 U.S. 105 (1973), a campus demonstrator who shouted to no one in particular "We'll take the fucking street later" did not utter fighting words. 414 U.S. at 107. Similarly, in *Cohen v. California*, 403 U.S. 15 (1971), the words "Fuck the Draft" on the defendant's jacket were not " 'directed to the person of the hearer,' " 403 U.S. at 20

(quoting *Cantwell*, 310 U.S. at 309), and could not reasonably have been taken as "a direct personal insult" by anyone. 403 U.S. at 20. Clearly, "fighting words" is not synonymous with public vulgarity or inflammatory rhetoric; at the very least, it requires a targeted victim.[4] That is a principal reason why *Texas v. Johnson*, 491 U.S. 397 (1989), heavily relied on by Petitioner, has no application here. The statute in *Johnson* banned flag burning under all circumstances. *See* 491 U.S. at 400 n.1.

The context in which the utterance is made is an integral part of the "fighting words" analysis. The New Hampshire court in *Chaplinsky* alluded to this when it noted that some offensive words, when said with "a disarming smile", might not be "fighting words." 91 N.H. at 320, 18 A.2d at 762. "Damned Fascist," for example, apparently was an insult that amounted to "fighting words" in New Hampshire in 1940. Similarly, in 1991, burning a cross on a black person's lawn in St. Paul in the middle of the night surely would be understood by a reasonable person as intended to inflict injury upon that person. *See generally Beauharnais v. Illinois*, 343 U.S. 250, 258-59 (1952).

Moreover, words that "by [their] very utterance inflict injury" are not just "fighting words" unprotected by the Constitution; they are also widely con-

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[4] Under the Minnesota court's construction, even swastikas and burning crosses, expressly referred to in the St. Paul ordinance, are proscribed only if they meet the individualized targeting requirement of "fighting words." Accordingly, Nazis marching with swastikas in Skokie, Illinois do not thereby necessarily utter "fighting words." *See Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (holding this activity protected), *cert. denied*, 439 U.S. 916 (1978).

sidered a basis for civil liability. A majority of states has recognized that certain expressive activity amounting to a deliberate campaign to inflict severe emotional distress upon a victim is a civil wrong. *See* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 43 (1982). *See also State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 337-38, 240 P.2d 282, 286 (1952) (Traynor, J.) (describing right to be "free from serious, intentional, and unprivileged invasions of mental and emotional tranquility"). Since 1948 the Restatement of the Law of Torts has provided that severe emotional distress directly caused by wanton or outrageous conduct is compensable at law. *Restatement of Torts* § 46 (Supp. 1948). To truncate the "fighting words" doctrine after half a century would call into question the States' power to provide a means of redress for expressive actions that "by their very utterance inflict injury."

This case, of course, does not focus on civil liability for inflicting severe emotional distress, nor is it about punishing "hate speech"—expression that falls outside what current societal norms may consider to be "politically correct." This case is about the authority of States and local governments to legislate against conduct targeted at particular individuals that not only is not an "exposition of ideas," but by its very nature inflicts injury or tends to incite immediate violence. Because this sort of injurious expression falls outside the First Amendment, States and local governments have authority to legislate against it.

B. The "Fighting Words" Construction Is Neither Overbroad Nor Unconstitutionally Vague.

In limiting the scope of the St. Paul ordinance to "fighting words," the Minnesota Supreme Court did precisely what this Court has repeatedly invited state courts to do. In *Chaplinsky*, a state statute far broader than the St. Paul ordinance was upheld by virtue of the state supreme court's narrowing construction. *See* 315 U.S. at 572-73. *See also Beauharnais*, 343 U.S. at 253. In *Gooding v. Wilson*, *Lewis v. City of New Orleans*, and *City of Houston v. Hill*, convictions under statutes and ordinances that punished speech were reversed because those statutes and ordinances had not been judicially limited to "fighting words."[5] *See Gooding*, 405 U.S. at 525; *Lewis*, 415 U.S. at 134; *Houston*, 482 U.S. at 462. Here, the Minnesota Supreme Court has properly narrowed the St. Paul ordinance, utilizing First Amendment doctrines articulated by this Court. As construed, the St. Paul ordinance is considerably narrower than the statutes and ordinances at issue in *Chaplinsky*, *Gooding*, *Lewis*, and *Hill*. Unlike those statutes and ordinances, the St. Paul ordinance is exclusively directed to conduct—not the spoken word. While this feature of the ordinance in itself does not remove it from the purview of the First Amendment, it drastically limits any potential overbreadth. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial

[5] In *Lewis*, although the lower court had used the term "fighting words," it was evident that the court was not defining the term in accordance with *Chaplinsky* and reversal therefore was required. *See* 415 U.S. at 132.

as well, judged in relation to the statute's plainly legitimate sweep").

Petitioner's vagueness challenge fails for the same reasons. It cannot be the case that a formulation repeatedly utilized by this Court runs afoul of the vagueness doctrine—and certainly not when the ordinance is limited by express incorporation of that formulation. This is far from the case of a statute that literally declares "all fighting words" to be criminal, leaving potential offenders to guess at what they may and may not say. This ordinance, as construed, applies to certain clearly identified conduct specifically targeted at an individual victim based on his or her race, gender, or religion. *Cf. Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (sustaining ordinance prohibiting "focused picketing" outside of residences). An individual acting with the specific intent that such activity would require—that is, the specific intent to inflict injury upon a particular person or incite a violent reaction—could not be in doubt that his or her conduct would violate this ordinance. There is therefore no "trap" here "for those who act in good faith." *United States v. Ragen*, 314 U.S. 513, 524 (1942). "Fighting words" necessarily are directed at a person willfully, and the element of willfulness disposes of any vagueness question. *See Screws v. United States*, 325 U.S. 91 (1945) (plurality opinion).

In fact, it is not clear that an ordinance directed at the sort of activity involved here *could* reasonably be more specific. The inherent limitations in the "fighting words" doctrine, the required bases of the acts that the ordinance prohibits (*i.e.*, acts based on race, religion, creed, color, or gender), and the limitation to acts of placement on property, together

make reasonably clear what conduct the ordinance is intended to address. Short of listing more examples of prohibited conduct—a list that would inevitably be incomplete and is not constitutionally required [6]—it is difficult to see what else the City of St. Paul and the Minnesota Supreme Court could have done.

C. The Ordinance As Construed Is Not Unconstitutionally Narrow.

Petitioner and *amici* supporting Petitioner argue that it is unconstitutional to single out for special criminal treatment the particular types of fighting words covered by the St. Paul ordinance, that is, nonoral expression related to "race, color, creed, religion or gender" that constitutes "fighting words."

The flaw in the argument lies in the fact that the ordinance applies to a sub-class of a category of *unprotected* speech.[7] There can be no First Amendment violation in government's tailoring its response to a particularly harmful or prevalent sub-class of conduct that has no First Amendment protection—it is sufficient that the ordinance be rationally directed at furthering a legitimate state purpose. *See Beauharnais*, 343 U.S. at 258-259, 261, 263, 267 (given legitimate legislative purpose of preventing racial violence caused by unprotected speech, it was outside

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[6] *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (upholding an ordinance characterized by "flexibility and reasonable breadth, rather than meticulous specificity," because, as construed by the Illinois Supreme Court, the ordinance gave "fair notice to those to whom it [is] directed").

[7] None of the cases cited by *amicus* Center for Individual Rights ("CIR"), Br. at 11-12, are to the contrary. In none of them was the issue the state's right to distinguish among categories of *unprotected* speech.

Court's authority to pass on "wisdom or efficacy" of means chosen). The test is easily met here. The ordinance reflects concern about the effects of virulent, individually targeted symbolic expressions concerning race, gender, or religion. There is no question that such expression may be rationally identified by the legislature as more likely than other types of speech to inflict injury or incite violence. *Cf. Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456, 2470 (1991) (Souter, J., concurring) ("secondary effects" of nude dancing justify ban); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (effects of adult theaters on localities justified ordinance treating them differently from other theaters). An ordinance proscribing *fighting words* of this variety rationally addresses this problem within the bounds that the First Amendment permits.

Even if it were possible to violate the First Amendment by singling out only certain "fighting words" for particularized treatment, there would be no violation here. First, the St. Paul ordinance as construed does not proscribe only anti-black conduct as opposed to anti-white conduct, or only anti-female as opposed to anti-male; rather, it punishes conduct relating to race or gender *whatever* the viewpoint of the speaker, so long as that conduct otherwise meets the "fighting words" criteria. The ordinance is thus viewpoint neutral. *Cf. FCC v. Pacifica Foundation*, 438 U.S. at 745-46 ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas").[8]

[8] *Amicus Curiae* CIR repeatedly implies that the St. Paul ordinance is improperly "viewpoint-based." *See, e.g.*, Br. Am. Cur. CIR at 10. CIR is incorrect. For example, CIR erroneously asserts that "symbols of religious harmony apparently are not reached by the regulation, nor are symbols of racial or gender equality or pride." *Id.* at 9 & n.7. Nothing in the ordinance, however, either as written or construed, prevents punishment of the use of any symbol to inflict immediate injury or incite an immediate breach of the peace.

Moreover, "even within the area of protected speech, a difference in content may require a different governmental response." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1977) (plurality opinion). Here, outside the area of any protected speech, it is surely equally appropriate for a local government to focus its response against a particular sort of activity believed by it to have the greatest potential for inflicting injury or inciting violence.[9] Legislatures are free to direct their responses against those forms of unprotected expressive conduct most likely to produce harm. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52-53 (1986). "'[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *Id.* (quoting *Young v. American Mini Theatres*, 427 U.S. at 71).

The St. Paul ordinance addresses an aspect of "fighting words" and incitement to violence that, in

[9] Bias-motivated crimes are an increasing national problem. *See Hate Crime Statistics Act of 1988: Hearings on S. 702, S. 797, and S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 20 (1988) (statement of Sen. Metzenbaum) (noting that more "hate crimes" had been committed in previous 3 years than in prior 20 years). In response, Congress recently enacted the Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990), requiring the Attorney General to collect and publish nationwide data on crimes that manifest evidence of prejudice against race or religion.

the judgment of the legislature, presents a most serious social problem: conduct that inflicts injury or tends to incite an immediate breach of the peace "on the basis of race, color, creed, religion, or gender." St. Paul City Ordinance § 292.02. While it is not permissible to punish expression merely because the majority does not agree with it or is offended by it, surely it is permissible for the legislature to make a judgment regarding the kind of conduct that is most likely to lead to violence and disorder. In the words of a unanimous Court:

> There are limits to the exercise of these liberties [of speech and of the press]. The danger in these terms from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

Cantwell, 310 U.S. at 310. If the public is to be protected from threats and intimidation, the legislature must be given the latitude to direct its response against that conduct most likely to cause injury; it is not constitutionally required simultaneously to legislate specifically against every hypothetical or imaginable kind of conduct. Speaking for the Court in upholding a state statute that punished racial and religious defamation, Justice Frankfurter stated:

> It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power.

Beauharnais, 343 U.S. at 261-62 (footnote omitted).

III. PETITIONER'S BURNING OF A CROSS ON A BLACK FAMILY'S LAWN IS A CLEAR INSTANCE OF "FIGHTING WORDS" PROSCRIBED BY THE ORDINANCE.

Petitioner's burning of a cross on a black family's lawn is clearly proscribed under the plain meaning of the St. Paul ordinance. It is alleged that Petitioner went to a black family's home in the middle of the night and deliberately placed a burning cross on the lawn for the purpose of intimidating the family on the basis of race. *See* Br. Am. Cur. ACLU at 2-3.

Under the Minnesota Supreme Court's limiting construction of the ordinance, Petitioner's conduct clearly amounts to "fighting words." Placing a burning cross on a black family's lawn in the middle of the night is conduct intended by its "very utterance" to inflict injury or incite violence. It is just this sort of "epithets or personal abuse" which this Court singled out in *Chaplinsky*:

> "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

315 U.S. at 572 (quoting *Cantwell*, 310 U.S. at 309-310).

The context of Petitioner's conduct confirms this conclusion. Given the historical experience of African Americans, a burning cross targeted at a black family is an unmistakably graphic threat. *Chaplinsky* expressly held that expressions that personally threaten are constitutionally unprotected. It declared that States could prohibit "disorderly words, including profanity, obscenity and *threats*." 315 U.S. at 573 (emphasis added). Terroristic conduct such as this can find no protection in the Constitution.

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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